

D.P.U. 92-130-D

Petition of Boston Edison Company to waive the requirements of 220 C.M.R. §§ 8.00 et seq. and defer any further activities regarding the Company's third request for proposals for the purchase of electricity from non-utility generators.

APPEARANCES: Douglas S. Horan, Esq.
Boston Edison Company
800 Boylston Street
Boston, Massachusetts 02199
FOR: BOSTON EDISON COMPANY
Petitioner

L. Scott Harshbarger, Attorney General
By: George Dean
Assistant Attorney General
Regulated Industries Division
Public Protection Bureau
200 Portland Street
Boston, Massachusetts 02114
Intervenor

David S. Rosenzweig, Esq.
Robert N. Werlin, Esq.
Keohane & Keegan
21 Custom House Street
Boston, Massachusetts 02110
FOR: THE COALITION OF NON-UTILITY
GENERATORS, INC.
Intervenor

Alan M. Epstein, Esq.
Kelley, Drye & Warren
101 Park Avenue
New York, New York 10178
FOR: DLS ENERGY, INC.
Intervenor

David A. Fazzone, Esq.
McDermott, Will & Emery
75 State Street
Boston, Massachusetts 02109-1807
FOR: EASTERN EDISON COMPANY
Intervenor

Andrew J. Newman, Esq.
Rubin and Rudman
50 Rowes Wharf
Boston, Massachusetts 02110
FOR: THE ENERGY CONSORTIUM
Intervenor

James K. Brown, Esq.
Mary Beth Gentleman, Esq.
Foley, Hoag & Eliot
One Post Office Square
Boston, Massachusetts 02109
FOR: JMC ALTRESCO, INC.
Intervenor

Alan J. Noguee
Energy Program Director
Massachusetts Public Interest Research Group
29 Temple Place
Boston, Massachusetts 02111-1305
Intervenor

Marc A. Reardon, Esq.
Bingham, Dana & Gould
150 Federal Street
Boston, Massachusetts 02110
FOR: KES FITCHBURG, L.P. AND
KES WEBSTER, L.P.
Intervenors

Mary Beth Gentleman, Esq.
Foley, Hoag & Eliot
One Post Office Square
Boston, Massachusetts 02109
FOR: NEW ENGLAND COGENERATION
ASSOCIATION
Intervenor

Rodger A. Kershner
Fairlane Plaza South
330 Town Center Drive, Suite 1100
Dearborn, Michigan 48126
FOR: CMS GENERATION COMPANY
Intervenor

Robert H. Russell, Esq.
Conservation Law Foundation
62 Summer Street
Boston, Massachusetts 02110
FOR: CONSERVATION LAW
FOUNDATION, INC.
Intervenor

John A. DeTore, Esq.
Rubin and Rudman
50 Rowes Wharf
Boston, Massachusetts 02110
FOR: ALTRESCO FINANCIAL, INC.
Intervenor

Michael T. Eckhart
United Power Systems, Inc.
Suite 750
3 Bethesda Metro Center
Bethesda, Maryland 20814
Intervenor

I. INTRODUCTION

A. Procedural History

The history of this proceeding is presented in limited detail.

1. On May 1, 1990, BECo submitted its demand forecast and supply plan to the Energy Facilities Siting Council with a proposal to build a 306 MW gas-fired generating facility in Weymouth (Edgar). This matter was docketed EFSC 90-12/12A.
2. On October 15, 1990, BECo submitted its third request for proposals ("RFP 3") to the Department of Public Utilities for review.¹ This matter was docketed as D.P.U. 90-270.
3. On May 20, 1991, BECo sought to defer action on the issuance of its RFP 3 until the Siting Council issued its decision on the proposed Edgar project, and on August 16, 1991, the Department denied the Company's request and approved RFP 3 using a ceiling price of the Edgar facility and setting a range for the supply block with the size of the final supply block to be adjusted based upon the Siting Council's determination of need. The Company issued RFP 3 on October 11, 1991.
5. On January 13, 1992, the Siting Council staff issued a tentative decision in the Edgar proceeding which found that BECo should plan for additional resource requirements of 121 MW in 1994 and 190 MW in 1995.
6. On January 24, 1992, the tentative decision was withdrawn.
7. On January 27, 1992, the Department issued an Order setting the size of the supply block for RFP 3 at 132 MW, the minimum end of the range established in D.P.U. 90-270.
8. On April 10, 1992, the Siting Council issued a final decision which found that BECo

¹ BECo's RFP 3 originally proposed two 100 MW combustion turbines as the avoided units.

can be anticipated to experience a capacity surplus totaling 149 MW in 1996, and 120 MW in 1997. 24 DOMSC at 302-303.

9. On April 30, 1992, BECo submitted a letter to the Department and the Siting Council indicating that it was deferring its Edgar project.

10. On May 20, 1992 BECo submitted a petition and supporting memorandum to the Department seeking to defer further proceedings in RFP 3. This matter was docketed as D.P.U. 92-130.

11. On June 25, 1993, the Department directed BECo to proceed with contract negotiations with Altresco Financial, Inc. ("Altresco") pursuant to RFP 3. D.P.U. 92-130.

12. BECo appealed the Department's Order, and on April 8, 1994, the Supreme Judicial Court ("SJC") set aside the Department's Order, and remanded the proceeding for further consideration. Boston Edison Company v. Department of Public Utilities, 417 Mass. 458 (1994).

13. On September 16, 1994, the Department issued its Order on remand and directed BECo to proceed with RFP 3. D.P.U. 92-130-B.

14. BECo appealed the Department's Order on remand, and on March 16, 1995, the SJC vacated the Department's Order, and remanded the proceeding with directions to consider additional evidence from the parties. Boston Edison Company v. Department of Public Utilities, 419 Mass. 738 (1994).

15. On July 28, 1995, the Department reopened the record in D.P.U. 92-130. In reopening the record, the Department noted that alternative dispositions may be in the public interest. D.P.U. 92-130-C.

16. On April 17, 1996, BECo and JMC Altresco² submitted a Settlement Agreement resolving all claims and proceedings related to RFP 3, and submitted a Joint Motion for Approval of Settlement Agreement and Termination of Proceeding ("Motion"). On April 24, 1996, the Attorney General submitted comments on the Settlement Agreement.

B. Description of Settlement Agreement

The Settlement Agreement includes termination of the proceeding in D.P.U. 92-130 and all other proceedings related to any obligation or requirement on the part of the Company to purchase power pursuant to RFP 3 (Settlement Agreement at 2). The Settlement Agreement provides that the sum of \$9.2 million will be paid to Altresco, and that this sum shall be recoverable by the Company as part of its fuel and purchased power clause revenues during 1996 (*id.*). The Settlement Agreement also provides that BECo will take the necessary steps to dismiss its pending appeal to the SJC of the Energy Facilities Siting Board approval of the Altresco-Lynn facility (*id.*).³ The Settlement Agreement does not address the merits of either party's positions or arguments in D.P.U. 92-130, D.P.U. 90-270, or any related proceeding or appeal (*id.* at 3). In support of the Motion, the Company and Altresco state that the proposed Settlement Agreement represents a reasonable settlement of all RFP 3 related claims and is an appropriate resolution of the issues in proceedings related to RFP 3 (Motion at 2).

² JMC Altresco for Altresco Financial, Inc., West Lynn Creamery, Inc., General Electric Capital Corporation, and U.S. Generating Company.

³ The Energy Facilities Siting Board ("Siting Board"), successor to the Siting Council approved the Altresco-Lynn facility in E.F.S.B. 91-103A. BECo and another party have appealed the Siting Board decision.

C. Comments of the Attorney General

The Attorney General requests that the Department deny the Motion (Attorney General Comments at 1). The Attorney General contends that the fuel clause should not be used to recover the costs associated with the Settlement Agreement (id. at 2). The Attorney General also contends that the incurrence of the costs associated with the Settlement Agreement are a consequence of the Company's imprudent pursuit of the Edgar project, and that the Company should bear the consequences of proposing an RFP 3 ceiling price that included a capacity component (id. at 2). The Attorney General states that either the RFP 3 process should proceed, or the Company is entitled to relief from the requirements of 220 C.M.R. §§ 8.00 et seq. The Attorney General also states that, given the SJC remand, it is impossible to identify any rational outcome of the reopened proceeding that would result in BECo's customers being responsible for any costs resulting from RFP 3 (id. at 2-3). The Attorney General states that an evidentiary hearing to determine the prudence of the costs of the Settlement Agreement is necessary (id. at 3).

II. ANALYSIS AND FINDINGS

With respect to the Attorney General's contention that the fuel clause is not an appropriate mechanism for recovery of the costs associated with the Settlement Agreement, the Department has consistently allowed recovery of buy-outs of purchase power contracts and obligations through the fuel charge mechanism. See Boston Edison Company, D.P.U. 92-1E (1992) (regarding Down East Peat L.P.); Commonwealth Electric Company, D.P.U. 94-3D (1994) (regarding CPC Lowell); Cambridge Electric Light Company and Commonwealth Electric Company, D.P.U. 95-2B/3B (1995) (regarding Eastern Energy

Corporation). The procedural history of RFP 3 clearly indicates that it has proceeded as a purchase power obligation of BECo. See D.P.U. 90-270, D.P.U. 92-130, D.P.U. 92-130-B. Accordingly, the Department finds that the Settlement Agreement is directly related to the purchase power obligation of the Company, and that recovery of the costs associated with the Settlement Agreement through the fuel charge mechanism is appropriate.

In addressing the Attorney General's contention that formal notice and an evidentiary hearing are necessary in order to determine the reasonableness of the Settlement Agreement, the Department, in reopening the record, clearly indicated that it would consider alternative dispositions that would best serve the public interest. D.P.U. 92-130-C at 2. Moreover, the Department stated that it was interested in and encouraged settlement of the issues in this proceeding as a possible disposition (August 17, 1995 Procedural Conference Tr. at 3-4). In order to allow for settlement discussions, the Department approved a motion by BECo and Altresco to protect the confidentiality of offers of compromise and settlement. See August 22, 1995 Hearing Officer Ruling. The Attorney General has been an intervenor in this proceeding. Accordingly, there was adequate notice that settlement of the issues was contemplated by the Department.

The Department must then address the reasonableness of the Settlement Agreement. In assessing the reasonableness of the Settlement Agreement, the Department must review the entire record as presented in the Company's filing and the record in the case to ensure that the settlement is consistent with the public interest. Commonwealth Electric Company, D.P.U. 91-200, at 5 (1993) (Department review of a settlement agreement between Commonwealth and Tenaska Mass, Inc.). See also, Boston Edison Company, D.P.U. 92-

183 (1992) (Department approval of a termination agreement of a purchase power contract with Down East Peat L.P.). The Department also must review the Settlement Agreement in the context of the precedent regarding buy-outs of purchase power contracts.

D.P.U. 91-200, at 6. The Department's regulations do not prohibit a company from negotiating a release from the obligations it has incurred through the RFP process, though such releases are subject to the Department's review. Altresco-Lynn, Inc. and Altresco-Pittsfield L.P., D.P.U. 91-142 and Cambridge Electric Light Company and Commonwealth Electric Company, D.P.U. 92-153, at 15 (1991). In addressing a petition for an exception from 220 C.M.R. §§ 8.00 et seq. involving the negotiation and finalization of a power sales agreement, the Department stated that a company might be under an obligation to pursue a settlement if it represented the best option for all parties, including ratepayers. Id.

The Department, noting the added flexibility, recommended that electric companies incorporate buy-out provisions in contracts with third-parties in the transition to the integrated resource management ("IRM") process. D.P.U. 89-239, at 92 (1990). Moreover, in the context of an IRM proceeding, the Department found that an options RFP could be an effective tool in addressing the risks that are inherent in the marketplace for additional resources. Boston Edison Company, D.P.U. 94-49, at 111 (1995). In Electric Industry Restructuring, D.P.U. 95-30, at 32-35 (1995), the Department recognized the amount by which the cost of existing contractual commitments for purchased power exceeds the competitive market price for generation as a component of stranded costs, and stated that a reasonable opportunity to recover stranded costs would be in the public interest.

In D.P.U. 92-130-C, the Department, on remand from the SJC, reopened the record

so that it could receive and consider evidence whether the deferral of Edgar resulted in a contract well in excess of avoided cost. See 419 Mass. 738, 748. The parties have contested the calculation and methodology for determination of avoided costs. BECo contends that the RFP 3 bid would result in a contract well in excess of avoided costs. The Company states that the net present value of the excess costs that would accrue to ratepayers over the life of the RFP 3 contract is in excess of \$261 million (Anglely Testimony at 4). Altresco contends that the Company has used an inappropriate measure of avoided costs, and contends that it is entitled to update its proposal (Egan Testimony at 8).

The record, as reopened, indicates a great deal of uncertainty regarding the price and availability of the Company's next most expensive capacity, however defined. The Attorney General's assertion that it is impossible to identify any rational outcome of the reopened proceeding that would result in BECo's customers being responsible for any costs resulting from RFP 3 presupposes an outcome that the Department has not reached. The Department can review the reasonableness of the Settlement Agreement in the context of the reopened record, and no additional evidentiary hearings are necessary. Even without a final determination of the Company's avoided costs, the Department finds that proceeding with RFP 3 would likely create some level of additional stranded costs. Given the history of this proceeding and the uncertainty in the determination of avoided costs, the Settlement Agreement benefits customers because the costs are significantly less than what the customers could have incurred in proceeding with RFP 3. Accordingly, the Department finds that the Settlement Agreement presents a reasonable resolution of the issues relating to RFP 3, and is in the public interest.

III. ORDER

Accordingly, after due consideration, it is

ORDERED: That the Joint Motion for Approval of Settlement Agreement and Termination of Proceeding of Boston Edison Company and JMC Altresco, Inc. filed with the Department on April 17, 1996 be and hereby is APPROVED, and it is

FURTHER ORDERED: That Boston Edison Company shall recover the cost associated with the Settlement Agreement as part of its fuel and purchased power clause revenues during 1996.

By Order of the Department,

Mary Clark Webster, Commissioner

Janet Gail Besser, Commissioner